



U.S. Citizenship  
and Immigration  
Services

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H4

[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER

Date: JUL 20 2006

IN RE:

Applicant:

[Redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The application for permission to reapply for admission after removal was denied by the Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who on May 30, 1999, at the San Ysidro, California, Port of Entry, applied for admission into the United States. The applicant presented a valid Mexican passport containing a non-immigrant visa that did not belong to him. The applicant was found inadmissible pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(6)(C)(i) for having attempted to procure admission into the United States by fraud, and section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182 (a)(7)(A)(i)(I) for being an immigrant not in possession of a valid immigrant visa or other valid entry document. Consequently, on May 31, 1999, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). The record reflects that the applicant reentered the United States on or about June 1, 1999, without a lawful admission or parole and without permission to reapply for admission in violation of section 276 the Act, 8 U.S.C. § 1326 (a felony). On June 1, 2001, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and a Notice to Appear (NTA) for a removal hearing before an immigration judge was issued. On June 19, 2001, an immigration judge ordered the applicant removed to Mexico. On July 31, 2001, in the United States District Court for the District of Puerto Rico, the applicant was convicted of the offense of reentry of deported alien. The record reveals that the applicant departed the United States on August 10, 2001, and as such self deported. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to travel to the United States and reside with his U.S. citizen spouse and children.

The Acting Director determined that an application for consent to reapply could only be filed after the applicant has been outside the United States for at least 20 years and denied the Form I-212 accordingly. *See Acting Director's Decision* dated August 5, 2004.

The AAO notes that the applicant has filed a Form I-212 on three different dates. He first filed a Form I-212 on January 18, 2002, which was denied on August 6, 2003, a second Form I-212 was filed on July 15, 2002, and denied on August 5, 2004, and a third Form I-212 was filed on February 4, 2004, which was denied on June 29, 2004. The appeal in the present matter is for the Form I-212 that was denied on August 5, 2004.

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

(i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now the Secretary of Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

On appeal, counsel stated that the Director erred in denying the Form I-212 by applying a non-applicable regulation, because the applicant had not been convicted of murder or criminal acts involving torture, nor had he ever been a lawful permanent resident of the United States. In addition, on the Notice of Appeal to the AAO (Form I-290B) filed on September 3, 2004, counsel stated that she would be submitting a brief and/or evidence to the AAO within 30 days. On April 28, 2006, the AAO informed counsel that this office had not received a brief or evidence related to this matter and unless counsel responded within five business days the appeal may be summarily dismissed. Counsel has not responded to the AAO's request. The appeal was filed on September 3, 2004, and to this date, over one year and nine months later, no documentation has been received by the AAO. Therefore, the AAO will adjudicate the appeal based on the documentation within the record of proceeding.

The AAO agrees with counsel and finds that the Acting Director erred in her decision stating that the applicant could not file a Form I-212 until after he has been outside of the United States for at least 20 years after his second removal. Section 212(a)(9)(A)(iii) of the Act does not preclude an applicant from filing a Form I-212 at any time after removal. In her decision the Acting Director refers to section 212(h)(2) of the Act, which is not applicable in this case.

The AAO conducts the final administrative review and enters the ultimate decision for CIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in de novo review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all the grounds for denial in the initial decision. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003).

Before the AAO can weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested. To recapitulate, the applicant was expeditiously removed from the United States on May 31, 1999. The applicant reentered the United States shortly after his removal without a lawful admission or parole and without permission to reapply for admission and was removed for a second time on August 10, 2001. Because the applicant illegally reentered the United States after his removal, the AAO finds that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C § 1182(a)(9)(C)(i)(II).

Section 212(a)(9)(C) of the Act states in pertinent part:

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

An alien who is inadmissible under section 212(a)(9)(C)(i)(II) of the Act may not apply for consent to reapply unless more than ten years have elapsed since the date of the alien's last departure from the United States. See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago *and* that CIS has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred on August 10, 2001, less than ten years ago. The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that the applicant is eligible for the benefit sought. The applicant in the instant case does not qualify for an exception under section 212(a)(9)(C)(ii) of the Act. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.